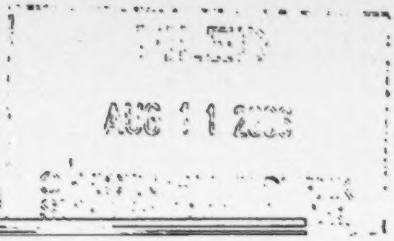

No. 05-1384

IN THE

Supreme Court of the United States

KATHLEEN A. SHEFCHUK, AS EXECUTRIX
OF THE ESTATE OF GREGORY D. SHEFCHUK, PETITIONER

v.

ILLINOIS UNION INSURANCE COMPANY;
ROBERT C. SHEFCHUK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The decision of the Sixth Circuit, as modified by that Court's Order denying the Petition for Re-Hearing, should not be allowed to stand because it fails the fundamental purpose of a system of justice under the Rule of Law: to have controversies actually resolved by courts in accordance with their determinations of applicable law in the context of the facts. Under the present decision, the parties before the Supreme Court have spent many years in litigation with the only result being the determination and finding that the district court did not follow Ohio law and analyze the allegations of pleadings for potential insurance coverage as to the Estate (Petition Appendix, p. 22a), immediately followed by a "Conclusion" that said the district court was affirmed.

Obviously, Respondent Illinois Union likes the current result, but that is shortsighted. As even Respondent's Brief in Opposition demonstrates, the Petition should be granted because a fundamental departure from any coherent system of justice has occurred. Something so basic, and important, needs to be addressed by the Supreme Court.

REASONS FOR GRANTING THE PETITION

I. Respondent Misstates the History of the Case and Mischaracterizes Arguments of the Estate in Several Important Respects.

At page 1 of Respondent's Brief, it is implied that all the underlying lawsuits had been filed prior to the death of Gregory Shefchuk. In fact, only very few were. The vast majority were filed subsequent to his suicide

and directly against the Estate and his Executrix. Counsel for the Executrix and the Estate demanded defense coverage from Illinois Union under the allegations of the respective underlying complaints.

At page 2 of its Brief, Illinois Union incorrectly states that the "District Court agreed with Illinois Union's legal arguments and granted Illinois Union's summary judgment." In fact, the district court in its Memorandum and Order (Petition Appendix, p. 25a) largely rejected Illinois Union's legal arguments and granted summary judgment in favor of Robert Shefchuk, and against Illinois Union, on complaints that had allegations that were identical to, and in the alternative to, those against Gregory Shefchuk. The district court simply assumed "that Gregory Shefchuk intentionally defrauded his clients" and never analyzed the specific complaints, and all their alternative allegations, to determine if there was any potential for coverage for the Estate. *Id.* at 49a. The Sixth Circuit held that this was an error by the district court "[i]n taking the allegations of the complaints filed against the estate as fact and determining whether coverage existed based on those facts," and that the district court thus did not follow Ohio law. (Petition Appendix, p. 22a).

Illinois Union implies at p. 3 of its Brief that the Sixth Circuit's rejection of an alternative argument (that no allegation was factually established) made by the Estate and Robert Shefchuk is somehow contrary to the Estate's position in the Supreme Court. That had nothing to do with the need for the analysis of the **allegations** of the complaints to determine if there was potential for coverage for any claim against the Estate. That is actually demonstrated by the next quotation from the Court of Appeals' Opinion at p. 3 of Respondent's Brief.

Illinois Union then incorrectly states, at the bottom of page 3 of its Brief, that "[t]he Sixth Circuit reviewed the complaints to determine whether any set of facts in the complaints could possibly lead to a finding of coverage." It is absolutely clear from the Sixth Circuit's Opinion that the Sixth Circuit never did this as to the twenty or so complaints against the Estate. No judicial officer of the United States has yet to perform this fundamental requirement of Ohio insurance law.

There is a section of the Sixth Circuit's Opinion entitled "III Specific Claims." (Petition Appendix, p. 17a). That section deals with only three specific complaints and the discussion and analysis of those complaints related only to Illinois Union's duty to defend Robert Shefchuk. As to actions in which Illinois Union specifically objected to the district court's finding that it had to defend Robert Shefchuk, the Sixth Circuit agreed with the district court. In one other case, *Savarino* (*Id.* 21a), the Sixth Circuit held that the district court was wrong in denying coverage for Robert Shefchuk and reversed the district court in that respect.

The Sixth Circuit then made no analysis of individual claims against the Estate in the section of its Opinion entitled "D. The Claims Against Gregory Shefchuk's Estate." (Petition Appendix 22a). Rather, it just generally held that the district court had erred in its general assumption against the Estate, which would justify reversal, except for the Sixth Circuit's declination to remand for additional review under its then mistaken recollection that counsel for the Estate had made some concession at oral argument. (*Id.* at 22a).

It is clear from the Sixth Circuit's Opinion in this case that the Sixth Circuit did not itself engage in an independent, original review of the allegations in all the underlying actions to determine if there was any

possibility of coverage for the Estate as to any of them. The Opinion is devoid of any such review, and the statement by the Court of Appeals that "We would be justified in remanding to the district court for individualized findings" is inconsistent with the concept that the Sixth Circuit did any individualized review.

The policy of the Sixth Circuit is to remand to a district court where a district court has failed to fully and completely review evidence when ruling on a motion for summary judgment. *Smith v. Hudson*, 600 S. 2d 60, 64 (6th Cir. 1979):

> We believe that under 56 (c) the District Court was obligated to consider . . . all "pleadings, depositions, answers to interrogatories, and admissions" properly on file and thus properly before this court . . . we do not think this is an unreasonable burden to place on the District Court. Rule 56 (c) simply requires the District Court to review the entire record before deciding whether to render a decision on the merits. This is no different than the obligation placed on the Court following a full trial on the merits, and the litigants are entitled to no less.

(Emphasis added).

II. Respondent's Authorities Do Not Support Denial of the Writ.

Almost all the legal authority cited Respondent's Brief is for the proposition that there can be a difference in the meaning of the terms "opinion" and "judgment". Those cases can be distinguished, and in no way support the concept that it is appropriate under Federal law, and

under the Rule of Law, for a Circuit Court of Appeals to announce a result inconsistent with the result that it expressly found that it should reach, where the result and the statement are in the same document.

For example, in *Eakin v. Continental Illinois National Bank & Trust Co. of Chicago*, 875 F.2d 114 (7th Cir. 1989), there was dispute by a bank obligated under a letter of credit as to whether underlying documents required as the proper remedy an order of injunction/specific performance or a monetary judgment. At one point, the district court entered an opinion saying that specific performance would be ordered. However, later, in open court, bank counsel told the district judge that the bank would prefer to have a monetary judgment in the amount of the letter of credit issued against it, which the district court then entered. The court of appeals refused to reverse the award of a monetary judgment. ("Having got what we asked for, we learned that it is not at all what we wanted." *Id.* at 118.)

Pratt v. Pratt, 99 Wash.2d. 905, 665 P.2d 400 (1983), simply involved a situation wherein a divorce trial court announced that divorce would be granted and directed counsel to prepare and circulate a judgment entry. Before the entry could be submitted to the court, the husband died. The husband's children from a prior marriage, who would inherit more if their father were not married at the time of his death, had counsel obtain a *nunc pro tunc* entry as of the date of the announcement. The Washington Supreme Court held that this was ineffective because there was never an actual judgment to correct. The marriage had ended by death, not divorce.

In *In re Yorba's Estate*, 176 Cal. 166, 167 P. 854 (1917), heirs of a decedent, years after they had participated in the distribution of the estate, which had been approved by the court, tried to have that approval

order characterized as a "mere opinion" and to obtain a different order. It was held that the original order was final and conclusive.

In *Ernst v. Municipal Court of California, County of Los Angeles*, 104 Cal. App. 3d 710, 163 Cal. Rptr. 861 (1980), an intermediate appellate court reversed the entry of a writ of prohibition against the retrial of a criminal prosecution for drunken driving. The ruling was on the basis that a previous appellate decision, reversing a conviction on procedural grounds and remanding it to the trial court for a new trial court, was *res judicata* and precluded the subsequent collateral attack by way of prohibition.

The Petitioner does not dispute the statement of Respondent at p. 7 of its Brief that a court can "render a decision without even offering an opinion to explain its reasoning." That is not what happened here, and it certainly is not the custom in federal appellate courts. Further, the principle that an actual opinion might not be necessary at all does not have as a corollary the principle that an opinion containing a specific finding of fact and law, but ending in the same document with a conclusion ordering a result that does not comport with the finding of fact and law, is to be ignored when further reviewed on direct appeal in the same case.

Finally, Respondent argues in Division IV of its Brief that this case raises no question of public importance. However, Respondent never addresses the central theme of Petitioner – the Sixth Circuit's handling and disposition of this case is inconsistent with any rational system of justice and the very concept of the Rule of Law. Regardless of the substantive area of law involved, a disposition of one party's rights in a case both contrary to the disposition of the rights of an identically situated party in the same case and contrary to the

court's finding of error as to a party needs to be reviewed and rejected by the Supreme Court as a valid methodology for handling any case. It does not matter whether the methodology was the product of "judicial activism," the "unpublished opinion" option, carelessness, a lack of concern for the legal rights of the parties, inadvertence, or some other cause. The principle involved in this case goes to the very heart and essence of the American legal system.

CONCLUSION

For the forgoing reasons, and for the reasons contained in support of the Petition for Writ of Certiorari, the Petition should be granted.

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